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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2013/47006

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|-----|---|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |

04/12/2014

DATE

.....

SIGNATURE

In the matter between:

**THE CENTRAL AUTHORITY FOR THE
REPUBLIC OF SOUTH AFRICA**

Applicant

And

K, T[...]

Respondent

JUDGMENT

SPILG, J:

3 December 2014

THE APPLICATION

1. In December 2013 the Central Authority for the Republic of South Africa brought an application under Article 12 of the Hague Convention on Civil Aspects of International Child Abduction (1980) (*the Convention*) for the return of the minor child born to the respondent and her husband. The applicant alleges that the respondent abducted their son from their residence in the United Kingdom and removed him to South Africa where they had previously lived.
2. The Convention was incorporated into our domestic law through the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (*the Act*). Section 3 of the Act empowers the applicant to bring the application, albeit that the father was not joined as a party in the proceedings. He did not file a confirmatory affidavit to the founding papers and no explanation has been tendered for the omission (compare *Central Authority v H* 2008 (1) SA 49 (SCA) at para 12).
3. It is however evident that the application was brought at the instance of the applicant's counterpart in England and Wales which sought assistance from our authority after the father had submitted a standard ICACU¹ application form. The form was attached to the founding affidavit. Moreover the failure to file a verifying affidavit was cured in part when the father subsequently filed

¹ Acronym for the International Child Abduction & Contact Unit

his affidavits. The failure to either join the father or obtain his supporting affidavit when the application was brought appears to be attributed to the late launching of the application.

4. The respondent filed an answering affidavit which was replied to in early May 2014. The application then stalled. The applicant explained that the difficulties encountered were trying to set the case down on the urgent roll and the need to appoint a curator *ad litem* for the child. This court was then allocated to case manage the matter.

On 10 June 2014 and pursuant to agreement reached in chambers a directive was issued facilitating the urgent appointment of a mutually acceptable curator. After obtaining consensus, directives were also issued with regard to the date by when the curator's report would be filed, the date for filing heads of argument and the date of hearing.

5. The court order appointing *Advocate Mbathe* as curator for the child required that she conduct a thorough investigation, prepare and file a report on her findings and represent the interests of the child in the proceedings.

This was in line with section 279² of the Children's Act 38 of 2005 which requires the appointment of a legal representative for the child in order to protect the minor's interests. In this regard I respectfully refer to the decision

² Section 279 of the Children's Act:

Legal representation

A legal representative must represent the child, subject to section 55, in all applications in terms of the Hague Convention on International Child Abduction.

of my brother Meyer J in *B and others v G* 2012 (2) SA 329 (GSJ) at para [12] which endorsed the view of CJ Davel & AM Skelton in *Commentary on the Children's Act* (at 17 to 21) that where the child is very young the function of the legal representative approximates that of a *curator ad litem*.

6. Section 275 of the Children's Act ³ provides that while the Convention is recognised as part of our domestic law, its provisions remain subject to the Children's Act. In terms of section 278(3)⁴ the court, when considering a Hague Convention application, must afford the affected child an opportunity to object and, having regard to the child's age and maturity, give due weight to any such objection. See generally Fabricius J in *Central Authority v MV (LS intervening)* 2011 (2) SA 428 (GNP) at para [13].

It is therefore evident that certain cases on the application of the Hague Convention which preceded the implementation of the Children's Act on 1 April 2010 may now have to be qualified.

7. Ms Mbathe's report prompted the respondent to file a supplementary affidavit. At this stage the court expresses its gratitude to Ms Mbatha for the thorough report she provided. It has been of great assistance.

³ Section 275 of the Children's Act:

Hague Convention on International Child Abduction to have force of law

The Hague Convention on International Child Abduction is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act.

⁴ Section 278(3) of the Children's Act provides that:

The court must, in considering an application in terms of this Chapter for the return of a child, afford that child the opportunity to raise an objection to being returned and in so doing must give due weight to that objection, taking into account the age and maturity of the child.

THE ISSUES

8. The applicant contends that prior to the abduction their child had habitually resided in the United Kingdom. It was submitted that in terms of Article 12 of the Convention this court was obliged to order the boy's immediate return as proceedings were commenced less than a year since he was abducted.

Ms Mofokeng on behalf of the applicant also challenged the respondent's entitlement to rely on the safe harbour defences contained in Article 13.

9. The defences relied on are that;

- a. the child has now settled in his new environment. However this is not an Article 13 defence but a proviso to Article 12 which is limited to instances where Convention proceedings are commenced more than a year after the child was removed. It therefore cannot assist the respondent.
- b. The child would be placed in an intolerable situation if ordered to return. This defence is provided for in Article 13(b).

The respondent also relies on the more circumscribed defences of physical or psychological harm under the same sub-article;

I should add that the respondent initially relied on consent or acquiescence under Article 13(a). This was not persisted with- correctly so in my view.

10. During argument two further issues arose.

The first was the applicant's submission that this court could impose terms on the father that would require him to provide maintenance and suitable accommodation for the child and the mother in the United Kingdom if return was ordered.

The other concerned the question of "*habitual residence*". It arose because of the court's concern that the respondent may not have formed a fixed intention to set up a new life with her husband in the United Kingdom because of the state of their marriage.

The parties were afforded an opportunity to file additional heads of argument.

11. In summary the issues can be reduced to;

- a. whether the child was habitually resident in the United Kingdom at the time of the abduction;
- b. if so, would he be placed in an intolerable situation as contemplated in Article 13(b) if ordered to return whether by reason of possible physical or psychological harm or otherwise;

- c. if he would be placed in such a position then should this court fashion an order directing the father, who is now domiciled and resident in the United Kingdom, to provide the child and the respondent with accommodation and maintenance while in the UK pending the outcome of a custody hearing and would such an order be effective in that country.

ARTICLES 3, 12 AND 13 OF THE HAGUE CONVENTION

12. Article 3 is the enabling provision which establishes wrongfulness. Once its requirements are met then Article 12 of the Convention requires this court to order the return of the child if its preconditions are met and provided none of the safe harbour defences circumscribed in Article 13 applies and Article 20 does not apply. The provisions read;

Article 3:

The removal or the retention of a child is to be considered wrongful where-

- (a) *it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*

- (b) *at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.*

Article 12:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. .

..

Article 13 which qualifies Article 12 provides;

- ' Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -*
- a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or*

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

Sonderup v Tondelli and another 2001 (1) SA 1171 (CC) at para [12] identified Article 20 as a further ground under the Convention for refusing the return of the child. It provides;

'The return of the child under the provisions of art 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.'

13. It appears unnecessary to contextualise the Hague Convention within the framework of our domestic law and in particular our Constitution. These have been considered extensively in leading cases from *Sonderup* in the Constitutional Court and in the SCA from *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) to more recent cases such as *Central Authority v H* 2008 (1) SA 49 (SCA) and *KG v CB and Others*

2012 (4) SA 136 (SCA). The broad general principles are now firmly established. and essentially are;

- a. as a signatory to the Convention we subscribe to the principle that it is necessary “*to protect children from the harmful effects of their wrongful removal or retention and to ensure their prompt return to the state of their habitual residence*” (see *Sonderup* at para 10);
- b. the underlying rationale is directed at protecting the best interests of the child and to act as a deterrent.

The expeditious return of the child minimises the harm he or she may be expected to suffer as a consequence of being uprooted from a familiar environment. Furthermore the court where the child was actually living at the time of removal is generally best suited to entertain a custody dispute and receive evidence in an efficient and cost effective manner⁵. Imposing an obligation on the relevant judicial or administrative authority to act promptly in securing the child’s return may also act as a deterrent⁶.

- c. the objective is not to force the returned child to submit to the primary residence of the resident parent. It is to ensure that the child returns to the jurisdiction of his or her habitual residence pending the outcome of

⁵ eg; *Sonderup* at para30; *Chief Family Advocate and another v G* 2003(2) SA 599 (W) at 606G

⁶ See generally on this paragraph, the article by Rhona Schuz in *Child and Family Law Quarterly* vol 13 no.1, 2001at p1 titled *Habitual residence of children under the Hague Child Abduction Convention- theory and practice*;

a custody hearing⁷ (assuming the marriage relationship has irretrievably broken down by this stage). In *KG v CB* the Supreme Court of Appeal ('SCA') ordered the return of the child to the jurisdiction of the English courts but not to the father's house; the order envisaged that the minor would reside with her mother in England and that the father would be obliged to pay for their accommodation and maintenance. This was also the case in *Sonderup* (see para 56, orders B3(2) and (3)).

- d. *"The Convention itself envisages two different processes - the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. The Convention clearly recognises and safeguards the paramountcy of the best interests of children in resolving custody matters. It is so recorded in the preamble which affirms that the State parties who are signatories to it, and by implication those who subsequently ratify it, are '(f)irmly convinced that the interests of children are of paramount importance in matters relating to their custody"'. (Sonderup at para 30)*

⁷ In *Sonderup* Goldstone said at para 30: *"The purpose of the Convention is important. It is to ensure, save in the exceptional cases provided for in art 13 (and possibly in art 20), that the best interests of a child whose custody is in dispute should be considered by the appropriate court."*

See also *Sonderup* at para 28

- e. The manner in which the courts are to apply the Convention within our constitutional framework is described as follows by Goldstone J in *Sonderup* at para 35.

“A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court. As appears below, the court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return. The ameliorative effect of art 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.”

The present case concerns the application of these principles to the given facts and the factors that should be taken into account when determining habitual residence where the family had only recently immigrated to the United Kingdom.

FACTS RELEVANT TO THE CHILD'S RESIDENCE

14. Mr and Mrs K first met in 1998 and towards the end of 2000 they acquired a townhouse in Northriding. They subsequently married in February 2004. They both were domiciled in South Africa and, from at least the time they had met, had been living in Johannesburg.
15. The child was born in 2006 and will be eight years old this month.
16. At the time of the child's birth his father was facing a disciplinary hearing on charges relating to insubordination. Mr K resigned before the tribunal made its findings known. However in February 2007 Mr K purchased a franchised restaurant. By 2008 he had incurred substantial debts and was forced to close the restaurant doors. He then looking for work in the security industry but with little success. Mr K's creditors were pressurising him. He owed them in the region of R1.5 million and possibly as much as R2 million. The family was now living with Mr K's parents, who appeared to be dependent on Mr K and the respondent. It was at this stage that Mr K decided to leave South Africa for the UK. By this time the marriage was already experiencing difficulties.
17. Mrs K in her answering affidavit states that Mr K *"indicated that the primary reason for moving was to avoid having to pay his creditors and get back on our feet financially"*

She continued: *"I was absolutely distraught as I did not want to leave my family in Johannesburg and my support structure. I was opposed to the move*

as we were moving to a country without any stability, no family, no home and no money”

Mr K vigorously disputes these allegations.

18. In May 2009 Mr K left for the United Kingdom to obtain employment and set up a home. The child was two and a half years old.
19. Mr K secured employment and the child and Mrs K then joined him during September 2009. The respondent claims that she was extremely reluctant to leave South Africa but her husband assured her that it would be a new life and that he would try and be a good father and husband. Mr K in a replying affidavit claimed that the decision to relocate to the UK was mutual.
20. They moved into a small ground floor apartment in Oxfordshire. At the end of 2010 Mr K resigned from his employment but had not secured work elsewhere. Mrs K had been able to secure *ad hoc* employment, the income from which effectively only covered the child's day care costs. By this time the respondent and the child were fearful of Mr K's reactions while Mr K grew more distant from both of them. Mrs K was also fearful of his abusive behavior towards both the child and herself. He was also demonstrating aggressive behavior towards the child.
21. Mrs K's parents who are South African citizens purchased return airline tickets for her and the child to come out on holiday. It is common cause that at this stage Mrs K was desperately unhappy both with the move to the United Kingdom and with her marriage. Although disputed, she was also concerned

about her husband's behavior towards their son. She had told her husband that she was unhappy living in England. This was after he had intercepted an email she had written to her sister stating that she wished to return to South Africa.

22. Mrs K reluctantly returned to the UK with the child after her husband had issued a threat regarding the consequences to her family if she did not do so. On her return, which was at the beginning of 2011, the family moved to Windsor where Mr K had found employment. They rented a second floor flat which had no garden access.

23. They continued to live in Windsor and by March 2012 Mrs K was able to obtain permanent employment as a graphic designer. She was however obliged to work long hours resulting in her only arriving home at about 18h30.

24. It is evident that there was no longer any love between Mr and Mrs K.

Moreover, according to the respondent, not only was her husband becoming more distant and emotionally unstable but was actually manhandling their son and humiliating him.

25. At the end of September 2013 the respondent discovered that her husband had again lost his job. By this stage he had worked for six different employers while in the UK. The loss of his employment together with the verbal, emotional and psychological abuse and her fear of physical violence either towards the child or her culminated in her deciding to leave the UK with the child. Mrs K feared for her and the child's safety and security as she believed that her husband posed a danger to them.

26. It is common cause that their relationship had ended and she claims that she was fearful of his reaction towards them if she told him that she was leaving with their child. She arrived in South Africa on 10 October 2013. At this stage the child was two months shy of his seventh birthday. He was seven and a half years old when I heard this matter.

27. In the ICACU application form which was completed on 14 October 2013 Mr K provided his contact address as Church Crookham, Hampshire and disclosed his occupation as that of a regional business development manager

28. It is apparent that:

- a. The child and his parents lived in South Africa from the time of his birth in December 2006 until September 2009, at which time he was not yet three years of age. He grew up within an extended family which included both sets of grandparents:
- b. For a year after that, until the end of 2010 when he turned four years old, the child lived with his parents in Oxfordshire. He attended a crèche. This period however is irrelevant if consideration is given to actual locality of residence as opposed to country.; a distinction which in my view is significant where there has been a change of national residence:

- c. For almost three years until the abduction they lived in Windsor and, it appears, also in Hampshire. The child made friends and attended school. However Mr K again lost his job.

29. Although an application brought under the Convention is decided generally on paper it is accepted that the applicant bears the onus to show that the child was habitually resident in the country from which he or she was removed. The onus then shifts to the respondent to demonstrate one of the Article 13 defences⁸.

30. In my view the applicant has failed to satisfy the court that the family's emigration was not involuntary and was not in order to evade Mr K's creditors. The evidence is that Mr K saw no future in South Africa. By contrast the respondent joined him in an attempt to make the marriage work as it was already falling apart. However it is evident that she went to the UK with the child reluctantly and based on the condition that she would try and make their marriage work. This was in September 2009. Just over a year later she still had not formed an intention to live in the UK. On the contrary, by the end of 2010, she had resolved to come back to South Africa with the child. She only returned to her husband under duress.

31. In my view the child's parents did not share a *mutual* intention to change their South African domicile or residence to the UK. The mother's position was always conditional.

⁸ *Central Authority v H* 2008 (1) SA 49 (SCA) at para 18 to 21 and *Pennello v Pennello* (Chief Family Advocate as Amicus Curiae) 2004 (3) SA 117 (SCA) at paras 17 to 18

32. Insofar as the child's residence is concerned; he had lived with his parents in Windsor from 2011 and his school reports reflect that he was enrolled at the Fleet Infant School, Hampshire from June 2011 to the end of May 2013. The father provided his residential address as Church Crookham, Hampshire. It therefore appears that between 2011 and October 2013 the family had again moved, although the distance may not have been far.

33. It is necessary to determine the meaning to be ascribed to the phrase '*Sytæ in which the child was habitually resident*' for the purpose of Article 3 of the Convention.

HABITUAL RESIDENCE OF THE CHILD UNDER THE CONVENTION

34. The term which I will reduce to '*child's habitual residence*' is not defined. More importantly the Convention does not umbilically link the child's residence to that of the father or custodial parent. This is a significant departure from the ordinary rules of domicile which direct that a married woman cannot ordinarily acquire a separate domicile to that of her husband, even if they are living apart⁹. A further consequence of applying the principles of domicile of dependency is that while the parents are married their minor child ordinarily takes on the father's domicile.

⁹ eg; *Rooth v Rooth* 1911 TPD 47 and the other cases cited by Ellison Kahn in *South African Law of Domicile of Natural Persons* (1972) at 76 ftn 520

35. These general principles regarding the wife's and minor's domicile are not founded on the same considerations. The former is justified on the basis of maintaining family unity and avoiding what is perceived to be an "*intolerable situation*" that would arise with split domiciles because of the mutual rights and obligations existing between husband and wife (Kahn at 72 and 85).
36. The principle is more relaxed in relation to minors. In particular Kahn cites the case of *Hull v McMaster* (1866) 5 Searle 220 at 225 to 226 where Cloete J considered that in cases of a change of the father's domicile the primary rule that the minor's domicile will automatically change "*only applies wherever the interests of these minors are not affected or prejudiced by such a change of domicile*".
37. It appears that the choice of phrase adopted in the Convention, when regard is had to its main objects as set out earlier, is intended to direct a factual enquiry into where the child was actually and mainly living for a reasonable period prior to the abduction.
38. The enquiry under the Convention is therefore shorn of the archaism on which the domicile of dependency is based. In this regard it is apposite to refer to Lord Denning's statement as Master of the Rolls in *In re P (GE) (An Infant)* [1965] Ch 568 (CA) at 583 that: *The tests of domicile are far too unsatisfactory. In order to find out a person's domicile you have to apply a lot of archaic rules. They ought to have been done away with long ago. But they*

will survive. Particularly the rule that a wife takes the domicile of her husband. And the rule that a child takes the domicile of his father”¹⁰.

It is rather directed at ensuring that the court seized with the custody hearing will be the one within whose jurisdiction the child was actually living for a sufficient time to have become acclimatised (to the surroundings and those with whom he or she may interact) and gained both a sense of attachment and a belief that it would endure with a relative degree of permanence. Here legal fictions would only serve to frustrate a fundamental objective of the Convention.

39. I am of the view that the Convention means what it says when adopting the concept the child’s habitual residence. It appears to be a factual enquiry that might only yield to the intention of the parents, considered individually, if an insufficient period of time has passed to find that the child has in fact settled into the environment where he or she has been placed. This may also apply to infants and very young children who have not established relationships with family and their own age group or who have not yet gained familiarity with their environment.

40. I believe support for this approach, albeit not necessarily on interpretational grounds, is found in a number of cases in the United States.

In *Feder v Evans-Feder* 866 F Supp 860 (US Dist 1994) the Appeal Court defined the habitual residence of the child to be;

¹⁰ See further Kahn at p72

*'the place where he or she from the point of view of the child has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose.'*¹¹

In the case of *Freidrich II* 78 F 3d 1060 at 1402 the US Court of Appeals stated that;

*'habitual residence can be 'altered' only by a change in geography and the passage of time, not by changes in parental affection and responsibility'*¹²

41. On the available evidence it appears that the child had integrated into his Hampshire environment over the more than two years he lived there. The evidence is derived from the school reports mentioned earlier. The important features of the reports are that he had integrated well with his peer group and had a number of close friends. He appeared well adjusted and enjoyed the school environment.

42. Although a difficult set of facts has presented itself, in my view the applicant demonstrated that for the purposes of the Convention the child was habitually resident in the UK prior to the abduction, since the child had established adequate roots within his environment and significant relationships with his

¹¹ See Schuz CFLQ at 14

¹² Schuz ibid at 14

peers and others for a sufficient period of time and he had no reason to believe that this was to be transitory.

ARTICLE 13 (b) DEFENCE

43. The respondent bears the onus of proving that the child would be placed in an intolerable situation if returned to the UK, whether by reason of physical or psychological harm or as otherwise contemplated under Article 13(b).

44. The respondent has sought to demonstrate this by reference to past conduct on the part of her husband which was directed particularly at their son.

45. Mr K admitted to some of the incidents but explained them away on occasion as a mistake or even negligence. The difficulty is that a profile has been built up in the papers of Mr K being aggressive, prone to lose his temper with even strangers and that the unfortunate impact of the recession on his employment has from time to time resulted in outbursts that he is unable to control. This has included physically manhandling, hitting and degrading the child. Unfortunately he has also verbally abused the child by humiliating and belittling him. The reports of the occupational therapist and educational psychologist reflect that these actions not only affected the child's self-esteem but also alienated him from his father to a significant degree.

46. The applicant contends that an order returning the child to the UK does not mean that the child has to reside with the father. Assuming that the court can

fashion a suitable order it is nonetheless my view that the tenuous nature of the parents residence in the UK at the time militates against such a course of action. This is not a case where the one parent has absconded with the child to an unfamiliar country. Both were born in South Africa, the child in fact lived in the grandparent's house before following Mr K to England and they find a ready and familiar support base here .

47. The respondent was also placed in an invidious position. Ordinarily both parents have established ties to their place of residence, which normally would constitute the child's habitual residence for purposes of the Convention. At the best of times immigrating to another country is likely to be traumatic and it may take a number of years before the family has settled to the point where repatriating is no longer a consideration.

48. If the one party is in an abusive relationship, he or she would simply leave and set up home elsewhere in the same city or country amongst familiar friends and family.

However where the victim of an abusive relationship has no family or friends to turn to and no ties with the country at all because it was the partner's wish to relocate, then one can more readily understand why it would be very difficult not to return to the country of origin where all the support structures are present. In the present case the respondent has been staying with family who are able to assist in caring for the child while she is at work, something that was impossible to do in the UK as there was no family there and the respondent was extremely concerned about her husband's conduct to the child when she was not present.

49. While the fact that the respondent had no settled intention to change her domicile unless the marriage worked out plays no role in the present case when determining the habitual residence of the child because he had established bonds to the UK in the respects described earlier, it remains an important consideration in deciding whether the child should be returned to the UK in a manner which would compel the mother to follow as the parent entrusted with primary residence because of the grave risk of the father causing physical or psychological harm to the child.
50. Moreover the assessments conducted of the child reveals that he has fully integrated into his life in this country and is well adjusted. At the time of the hearing he had been in South Africa for over eight months. He has made new friends since living here and has strong bonds with his relatives.
51. Moreover once the court finds that an Article 13 defence is sound the Convention itself does not require repatriation.
52. It is apposite to return to *Sonderup* and the following statements of Goldstone J:

'[28] The Convention itself envisages two different processes — the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. . . .

[29] . . . One can envisage cases where, notwithstanding that a child's long-term interests will be protected by the custody procedures in the country of that child's habitual residence, the child's short-term interests may not be met by immediate return. In such cases, the Convention might require those short-term best interests to be overridden. . . .

. . .

[32] . . . (T)he exemptions provided by arts 13 and 20 . . . cater for those cases where the specific circumstances might dictate that a child should not be returned to the State of the child's habitual residence. They are intended to provide exceptions, in extreme circumstances, to protect the welfare of children. . . .

[33] The nature and extent of the limitations are also mitigated by taking into account s 28(2) of our Constitution when applying art 13. The paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention. The absence of a provision such as s 28(2) of the Constitution in other jurisdictions might well require special care to be taken in applying dicta of foreign courts where the provisions of the Convention might have been applied in a narrow and mechanical fashion.

53. The Children's Act now informs the court as to what may be taken into account regarding the child's best interests. As stated earlier the child's own

wishes may be considered and weighed in the circumstances envisaged. Adv Mbathe established the child's wishes. The child was over seven and a half years old when asked for his views. He had no hesitation in stating his preference for remaining here. Indeed it would be most disruptive to his schooling and his current milestones if he was to be returned to await the outcome of a custody battle.

ORDER AD FACTUM PRAESTANDUM AGAINST PEREGRINUS FATHER

54. The applicant submitted that terms could be imposed in a court order which would require the father to provide maintenance and suitable accommodation for the child on returning to England. I expressed concern regarding the effectiveness of such an order even if the English Central Authority agreed to it: The introduction of such terms would appear to require the father's consent failing which an enquiry into his financial position, which itself might be problematic if this court could not effectively undertake such an enquiry.

55. However, failing the father being afforded a fair opportunity to deal with any proposal suggested by the applicant, the issue becomes transformed into a number of conflict of laws questions that might arise if it becomes necessary to enforce this court's order in England if the child is returned, or pending return if the father does not consent.

56. *Ms Willcock* , on behalf of the respondent, raised concern regarding the effectiveness of any proposed order that would require the father, who is a *peregrinus*, to take some positive act within the jurisdiction of the English Courts. Ordinarily this court would only have jurisdiction over a *peregrinus* in cases where the order requires him to perform a positive act within the court's jurisdiction. In general compare *Foize Africa (Pty) Ltd v Foize Beheer BV and others* 2013 (3) SA 91 (SCA) at para 10.
57. There would still remain difficulties even if this court was to assume that in order to give effect to our respective international obligations both under the Hague Convention and the United Nations Convention of the Rights of a Child ('*UNCRC*') English Courts would be disposed to interpret the provisions of both conventions purposively were this court to impose conditions that the aggrieved party needed to comply with.
58. Moreover the type of order fashioned by our courts following *Sonderup* acknowledges that the final arbiter remains the foreign court.
59. The difficulty, which would face our courts if the roles were reversed, is that under the principles of conflict of laws, the court which is asked to enforce the order of a foreign jurisdiction must be satisfied that to do so would not be contrary to public policy. This would generally require the observance of the rules of natural justice whereby the party against whom the order is sought to be enforced was afforded a fair hearing. See *Jones v Krok* 1995 (1) SA 677 (A) at 685B – E; compare *Society of Lloyd's v Price*; *Society of Lloyd's v Price v Lee* 2006 (5) SA 393 (SCA) at paras 42 to 48 and see the comprehensive

analysis by van Zyl J in *Society of Lloyd's v Romahn and others* 2006 (4) SA 23 (C) at paras 95 to 110).

60. In the present case the father has not been given an opportunity to consider the conditions which the applicant believes this court should impose on him to provide accommodation and maintenance for the respondent and their child if this court were to order the latter's return.

61. Ms Willcock informed the court that difficulties were encountered in a case where she represented the mother in a Hague Convention abduction case. The mother had been ordered on appeal to return her child to the United Kingdom and in terms of the order the father was obliged to provide suitable accommodation for her and the child as well as maintenance (*KG v CB*). The relevant parts of the order read;

'1. It is ordered and directed that the minor child, T, be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority for England and Wales.

2. In the event of KG (the mother) notifying the Office of the Family Advocate, Johannesburg (the family advocate) within one week of the date of issue of this order that she intends to accompany T on her return to the United Kingdom, the provisions of para 3 shall apply.

3. CB (the father) shall within one month of the date of issue of this order, institute proceedings and pursue them with due diligence to obtain an order of the appropriate judicial authority in the United Kingdom in the following terms:

3.1 Any warrant for the arrest of the mother will be withdrawn and will not be reinstated and the mother will not be subject to arrest or prosecution by reason of her removal of T from the United Kingdom on 14 February 2009 or for any past conduct relating to T. The father will not institute or cause to be instituted or support any legal proceedings or proceedings of any other nature in the United Kingdom for the arrest, prosecution or punishment of the mother or any member of her family, for any past conduct by the mother relating to T.

3.2 Unless otherwise ordered by the appropriate court in the United Kingdom:

3.2.1 The father is ordered to arrange, and pay for, suitable accommodation for the mother and T in the United Kingdom. The father shall provide proof to the satisfaction of the family advocate, prior to the departure of the mother and T from South Africa, of the nature and location of such accommodation and that such accommodation is available for the mother and T immediately upon their arrival in the United Kingdom. The Central Authority for England and Wales shall decide whether the accommodation thus arranged by the father is suitable for the needs of the mother and T, should there be any dispute between the parties in this regard, and the decision of the Central Authority for England and Wales shall be binding on the parties.

3.2.2 The father is ordered to pay the mother maintenance for herself and T from the date of T's arrival in the United

Kingdom at the rate of £350 per month. The first pro rata payment shall be made to the mother on the day upon which she and T arrive in the United Kingdom and thereafter monthly in advance on the first day of every month. Should the mother receive state support, then the monthly amount thereof shall be deducted from the £350 per month payable by the father.

3.2.3 The father is ordered to pay any medical and dental expenses reasonably incurred by the mother in respect of T, such as are not covered by the National Health Service in the United Kingdom.

3.2.4 The father is ordered to pay for the reasonable costs of T's schooling and also the costs of her other reasonable educational and extramural requirements in the United Kingdom, such as are not provided by the state.

3.2.5 The father is ordered to purchase and pay for economy-class air tickets, and if necessary, pay for rail and other travel, for the mother and T to travel by the most direct route from Johannesburg, South Africa, to Harlow, United Kingdom.

3.2.6 The father and the mother are ordered to cooperate fully with the family advocate, the Central Authority for England and Wales, the relevant court or courts in the United Kingdom, and any professionals who are approved by the Central Authority for England and Wales to conduct any assessment to determine what

future residence and contact arrangements will be in the best interest of T.

3.2.7 The father is granted reasonable supervised contact with T, which contact shall be arranged without the necessity of direct contact between the father and the mother.

4. In the event of the mother giving the notice to the family advocate referred to in para 2 above, the order for the return of T shall be stayed until the appropriate court in the United Kingdom has made the order referred to in para 3 and, upon the family advocate being satisfied that such an order has been made, he or she shall notify the mother accordingly and ensure that the terms of para 1 are complied with.

5. In the event of the mother failing to notify the family advocate in terms of para 2 above of her willingness to accompany T on her return to the United Kingdom, it is to be accepted that the mother is not prepared to accompany T, in which event the family advocate is authorised to make such arrangements as may be necessary to ensure that T is safely returned to the custody of the Central Authority for England and Wales and to take such steps as are necessary to ensure that such arrangements are complied with.

6. ...

C. *The family advocate is directed to seek the assistance of the Central Authority for England and Wales in order to ensure that the terms of this order are complied with as soon as possible.*

D. *In the event of the mother notifying the family advocate, in terms of para B.2 above, that she is willing to accompany T to the United Kingdom, the family advocate shall forthwith give notice thereof to the registrar of the South Gauteng High Court, to the Central Authority for England and Wales, and to the father.*

E. *In the event of the appropriate court in the United Kingdom failing or refusing to make the order referred to in para B.3 above, the family advocate and/or the father is given leave to approach this court for a variation of this order.*

F.

62. The orders in para 3.2.1 to 3.2.6 are *ad factum praestandum*. They follow the form of order made in *Sonderup* with due deference, by means of appropriate caveats, to the sovereignty of the English courts.

63. Ms Willcock produced the orders made by the English High Court (Principal Registry of the Family Division) on 2 July 2012 by Hughes QC sitting as a High Court Judge and by Brasse J on 4 October 2012 and 13 February 2013. In order to retain the anonymity of the parties so as to protect the interests of the child, I will refrain from providing the full citation. It may be referred to as *CB v KG and another* case number HA07P00139. Hughes QC recorded the following in her order;

“ ... with regard to the Order of the Supreme Court of South Africa ... ordering the child ... to be returned to the UK and setting certain conditions for the applicant father to comply with so as to facilitate her return, that the father has complied with the stated conditions to date but that the Court noted that he is not obliged to provide accommodation beyond the terms of the tenancy of the property provided for the child and the mother “

64. It is evident that the English court did not consider itself necessarily obliged to follow the SCA decision despite the English and Welsh Central Authority agreeing with its South African counterpart to respect the SCA order. This was anticipated by the SCA if regard is had to the preamble to para 3.2 of the order it made.
65. The residual requirement of effectiveness appears to be addressed by means of the caveats and the pre-conditions before the child is obliged to be returned to the UK. Nonetheless the father remains in England, outside the reach of this court's jurisdiction (compare *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 499E-F).
66. The main issue however relates to whether the English courts would respect the order bearing in mind the principle of sovereignty, the territorial limitations of a domestic court's order and, even leaving that aside, whether under conflict of laws jurisprudence a foreign court could be satisfied that the rules

of natural justice were adhered to; particularly with reference to whether the father was given notice and afforded a hearing.

67. There was no evidence on the papers before me to suggest that the father was precognised of this possibility. There is no evidence presented of the father's attitude in this regard. On the contrary the evidence indicated that he was struggling financially.
68. It appears that unless the father agrees to provide suitable accommodation and pay adequate maintenance it would be difficult for the respondent to seek enforcement of this court's order in the UK without having afforded him an opportunity to address those issues before the order is made.
69. I am accordingly not prepared to find an accommodation to have the child returned to the UK albeit in the custody of the respondent where it is evident that the Article 13(b) defence is sound.

COSTS

70. The applicant has an obligation under Article 12 of the Convention to bring applications of this nature. There may be little scope for exercising an independent discretion when requested to institute proceedings by its foreign counterparts provided the request complies with the necessary requirements and presumably is not frivolous.

71. The respondent has sought to criticise the applicant's handling of the matter.

It is correct that there was a lengthy initial delay. In part this was claimed to be due to difficulties in establishing the respondent's whereabouts. The respondent is the successful party and costs will follow.

ORDER

72. It is for these reasons that on 28 July 2014 I dismissed the application with costs, including the costs of two counsel.

DATES OF HEARING:

DATE OF ORDER: 28 July 2014

DATE OF JUDGMENT: 4 December 2014

LEGAL REPRESENTATIVES:

FOR APPLICANT: Adv A Willcock SC

Adv

Alan Levine & Associates

FOR RESPONDENT: Adv Mofokeng

State Attorney

AMICUS CURIA FOR CHILD Adv Mbathe